



May 19, 2006

Municipal Stormwater Comments - Western Washington Draft Permit
WA Department of Ecology
Water Quality Program
PO Box 47696
Olympia, WA 98504-7696

Re: Comments on Draft NPDES Phase II Stormwater Permit for Western Washington

We appreciate both the considerable work that Ecology has expended to draft the Phase II permit and the difficult issues the department must address. As one of the municipalities subject to the Phase II permit, we are very concerned about the impact the proposed permit will have on our community. This permit burdens municipalities with goals and performance standards which are clearly in excess of the federal Phase II rule, in excess of the Phase II permits issued in many other states, and beyond what Phase II communities can reasonably implement. In addition, the proposed permit for Western Washington exceeds the proposed permit requirements for Eastern Washington, creating program, economic development, and financial inequities between the two parts of the state that cannot be justified by their climatic differences.

The City shares Ecology's goal of improving water quality in the receiving waters, but believes the proposed permit is setting up all municipalities for failure and routine violations. Many of the permit requirements are designed to provide Ecology with information that it feels would be useful, but collecting that data is going to be extremely labor and cost intensive, if even feasible at all, and will not result in any improvement in water quality. In addition, by placing this desire for information as requirements in the permit, Ecology is exposing all municipalities to violations of the federal Clean Water Act and third party lawsuits over information gathering rather than water quality improvement. Ecology should develop a program to work with municipalities through means other than the permit, to collect that information.

Enclosed you will find our other comments on the draft permit. If you have any questions, please contact Josh Johnson, Stormwater Manager, at (360) 442-5210, or myself at (360) 442-52221.

Sincerely,

Jeff Cameron, PE
Public Works Director

SPECIAL CONDITIONS

- S2.A.1. (Page 9, Line 33):** Delete the words “into and” from this sentence. Federal regulations require that permits be obtained for discharges from the MS4. The MS4 Permittee cannot be held liable for a discharge into its MS4 from facilities over which it has no control. The Permittee will implement public education and illicit discharge detection programs to minimize non-stormwater discharges to the MS4, but it cannot absolutely control discharges from private parties. This permit language would also expose the Permittee to double jeopardy for the same discharge from a private party – a violation when discharged into the MS4 and a violation when discharged from the MS4.
- S4.A. (Page 11, Line 5):** Delete any reference to RCW 90.48.520 in this Permit. Reference to RCW 90.48.520 is unacceptable because it makes MS4s subject to a state law regarding wastewater treatment and discharge permits for "wastewater." The federal Clean Water Act and the Washington state Water Pollution Control Act distinguish between wastewater and storm water. Although they each contain "pollutants" when discharged into a water of the U.S., they are distinctly different; and the statutes and regulations contemplate that they will be regulated differently. This regulatory distinction reflects the real-world differences between sanitary sewer systems and storm sewer systems. The proposed subsection S4.A does not acknowledge those differences. (Please refer to a more detailed discussion on this subject from King County, included later in these comments).
- S4.E. (Page 11, Line 18):** This is bureaucratic doublespeak – in order to demonstrate compliance with the provisions of this permit, comply with this permit. If Ecology wants to reference the goals of the Clean Water Act, this paragraph could be re-written as follows: “This permit meets the goals of the Clean Water Act.”
- S5.A. (Page 11, Line 31):** This paragraph should be revised as follows to clarify what constitutes compliance with MEP and AKART:
- “Each Permittee shall develop and implement a Stormwater Management Program (SWMP). A SWMP is a set of actions and activities comprising the components listed in S5.B and S5.C.1 through S5.C.6, and any additional actions necessary to meet the requirements of applicable TMDLs (see S7). The SWMP shall be designed to reduce the discharge of pollutants from the regulated small MS4 to the maximum extent practicable and to protect water quality. Implementation of the SWMP is deemed to be compliance with special provisions S4.C. (MEP) and S4.D. (AKART), and compliance with the requirement to protect water quality. This Section applies to all cities, towns and counties covered under this Permit, including cities, towns and counties that are Co-Permittees. Where the term “Permittee” is used in this section the requirements apply to all cities, towns and counties covered under this Permit.”

S5.A.3.a. (Page 12, Line 18)(See also Appendix 3 Part II): Longview is willing to provide cost information at the program level, but the requirements in Appendix 3 are onerous and unreasonable. See our Appendix 3 comments for more detail.

S5.C.1.a. & b. (Page 13, Line 9; and Page 14, Line 15) – Behavior:

Delete the requirement for measurably improving understanding, actions and behavior; these requirements are not attainable. While it is possible to measure understanding of the issues and solutions, many parts of Washington are experiencing strong growth and turnover in resident and worker populations, which will make compliance almost impossible as measured improvements among current residents are rendered statistically non-significant by this influx and exodus of residents and workers. In addition, measuring behavior changes is not possible. We can track indicators of behavior, such as number of illicit discharges reported, but we cannot measure behavior change. And behavior changes will also be subject to the variability of turnover in the resident and worker population.

Grandiose compliance metrics will waste precious outreach dollars on consultants and surveys that don't reveal anything substantive for the long term – only for that snapshot in time and for that segment of the community sampled, and will result in education programs focused narrowly so that results are more easily demonstrated. For example, most education campaigns will be as narrow as possible to pursue topics/audiences based on ability to measure short term audience knowledge rather than improve water quality. Efforts to quantify understanding and behaviors on each topic in each city and county will be redundant, have varying degrees of accuracy, and will be of little value anywhere (except maybe as a relative measure in one area for one set of audiences about one topic).

The topics in this section are hardly unique to Western Washington, yet Ecology offered a different (and more attainable) set of goals for the Eastern Washington Phase II Permit, and does not propose to require that Eastern Washington Permittees demonstrate improvement in the understanding and behaviors of the targeted audiences. The marked inequities between these two permits are indefensible.

Ecology should use its annual permit fees revenue to commission the studies and advertisement campaigns it desires. This approach would be more efficient and cost effective for us all and could yield useful information.

S5.C.1.a. & b. (Page 13, Line 9; and Page 14, Line 15) – Improvement:

The requirements that the public education and outreach program be designed to achieve “measurable improvements” in behavior, and that the Permittee “measure” adoption of targeted behaviors, is unreasonable and infeasible.

Permittees can measure our outreach efforts and how well the audience understands stormwater issues and actions for reducing pollutants in runoff, but there is no feasible or reliable method to measure behavior changes. We can measure indicators of behavior such as reports of illicit discharges and notices/violations issued, but we cannot actually measure changes in behavior.

Even measuring improvements in understanding of stormwater issues is not feasible. After the initial round of education, we would probably be able to measure improved understanding; however, because our populations are transient, with residents and businesses moving in and moving out of the community, measuring improvement over the long term is not practical because the targeted audience will always consist of new members.

S5.C.1.a. (Page 13): This list of topics is unnecessarily limited and does not even offer topics to address the discharges and issues identified in S5.C.3.b.ii. regarding prohibited and conditionally permitted discharges. Rather than being finite and definitive, the list should be a set of suggestions to inspire and pull from, and allow other topics upon department approval.

S5.C.3.a.ii. (Page 15, Line 21): Provide a definition for “connection.” Since streets, curbs, and gutters are defined to be part of the MS4 system, does connection include only directly connected pipes, or does it also include curb penetrations and discharge points for roof downspouts or basement sump pumps? Does connection include sheet flow from abutting property that flows over the curb or driveway and into the gutter?

S5C.3.a.iv. (Page 15, Line 27): The reference on should be S5C.3.a.i – iii.

S5C.3.b.iv. (Page 17, Line 1): Revise this paragraph to read as follows (new text underlined):

“The SWMP must further address any category of discharges in i or ii above if the discharges are identified as significant sources of pollutants to waters of the State, except for discharges in i above that are natural background conditions.”

S5C.3.c.ii. (Page 17, Line 18): Revise this paragraph to read as follows:

“Field assessment activities, including visual inspection of priority outfalls areas identified in i, above, during dry weather ~~and~~ for the purposes of verifying outfall locations, identifying previously unknown outfalls, and detecting illicit discharges.”

S5C.3.c.ii. (Page 17, Line 28): Replace the word “shall” with the word “may.” The document referenced, *Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments*, has not been

through the required rule-making process and therefore should be listed only as suggested guidance, not as specific criteria.

S5C.3.c.v. (Page 18, Line 18): Regardless of the regulations adopted by the Permittee, termination of the connection cannot be ensured within 180 days if the discharger resists the Permittee's enforcement efforts and court action is required to enforce the local ordinance. I suggest adding the following language to the end of the paragraph on line 19:

"... as needed, except that any enforcement action required through the court system shall be exempted from the 180 day limit provided the Permittee diligently pursues such court action."

S5C.3.d.ii. (Page 18, Line 26): Permittees should not be required to track and report calls that are wrong numbers, general inquiries about agency business, or questions or comments or other topics unrelated to the IDDE program. I suggest modifying this line as follows:

"... Keep a record of all ~~calls~~ reports received and of all follow-up ..."

S5C.3.f.ii. (Page 19, Line 7): This paragraph is intended for field staff that may observe an illicit discharge or connection, but this is not the staff that will respond to the illicit discharge or connection. Therefore, the training requirements in this section are greater than necessary and inappropriate for staff that only observes and reports. I suggest that this section be modified as follows:

"No later than three years after the effective date of this permit, an ongoing training program shall be developed and implemented for all municipal field staff, which as part of their normal job responsibilities might come into contact with or otherwise observe an illicit discharge or illicit connection to the storm sewer system. Such staff shall be trained on the identification of ~~an a potential~~ illicit discharge/connection, and on the proper procedures for reporting ~~and responding to the potential~~ illicit discharges/connections. Follow-up training shall be provided as needed to address changes in procedures, techniques or requirements. Permittees shall document and maintain records of the training provided and the staff trained."

S5.C.4. (Pages 19 through 22): This section requires controlling runoff from new development and redevelopment, and references Appendix 1, which requires flow control to a pre-developed condition defined as forested land prior to the influence of Euro-American settlement. If that definition for pre-developed condition remains, this requirement is in direct conflict to the State's vesting laws for existing development, is unattainable, and raises serious legal concerns. Please see our comment on the Appendix 1 definition.

S5.C.4. (Pages 19 through 22): Throughout this section, reference is made to application of these requirements to projects less than 1 acre in size that are part of a larger common plan of the development or sale. Under state law, Permittees cannot require development controls or mitigation for a specific project when those controls or mitigations are based on speculation of future projects. Permittees can impose such requirements when there is a larger common development plan, but the mere fact of common ownership or sale of land does not allow Permittees to impose these regulations on the currently proposed project. Delete the words “or sale” from all provisions in this section.

S5.C.4.a.ii. (Page 20, Line 2): This requirement to document how the criteria and requirements will protect water quality, etc., is unattainable and should be deleted. This section requires Permittees to select BMPs in accordance with Appendix 1, which references the Ecology Stormwater Management Manual for Western Washington, and allows Permittees who use the Manual or an equivalent Phase I jurisdiction manual approved by Ecology to cite the manuals as the sole required documentation. The BMPs in the manuals, by Ecology’s own admission evident in the monitoring requirements of both the Phase I and Phase II permits, have not been proven to be effective – just assumed to be effective. Yet if a Permittee or developer desires to use a BMP other than one listed in those manuals, an impossible threshold is established requiring them to document how the BMP will be effective. This establishes the Manual as the standard, even though it has not been reviewed through the rule-making process nor been proven effective. All references to the Stormwater Manual must be removed until it has gone through the rule-making process.

S5.C.4.b.v. (Page 21, Line 6): Ecology has done a poor job publicizing and enforcing their general construction stormwater permit, yet this provision would effectively require cities to assume an equivalent enforcement role and meet an impossibly high inspection rate of 95%. How can Ecology demand that Permittees with markedly less resources and expertise, perform significantly better than Ecology’s own record of enforcement? Even NPDES permits for industrial dischargers and point dischargers rely on self-monitoring and self-certification, with spot checking for compliance. Requiring Permittees to inspect all sites is unreasonable. A more reasonable expectation would be to inspect 50% of all sites, and rely upon self-monitoring and reporting for the remainder of the sites.

S5.C.4.b.vii. (Page 21, Line 16): The word “construction” is misspelled.

S5.C.4.c.ii. (Page 21, Line 27): Delete the reference to the Ecology stormwater manual. This section should be revised as follows:

~~“Adoption of maintenance standards. that are as protective, or more protective of facility function, than those specified in Chapter 4 of Volume V of the 2005 Stormwater Management Manual for Western Washington.”~~

S5.C.4.c.ii. (Page 21, Line 42): It appears that there is no schedule for compliance for maintenance that requires capital construction greater than \$25,000. Is that Ecology's intent?

S5.C.4.c.iii. (Page 22, Line 1): As it pertains to catch basins, inlets, and other flow control facilities in the public right of way, owned and operated by the Permittee, this section conflicts with section S5.C.5.d., which contains a more practicable requirement that they be inspected at least once each permit cycle. Add the following to the end of this paragraph:

"The inspection frequency of inlets, catch basins, and other flow control and water quality facilities owned or operated by the Permittee shall be as required in S5.C.5.d."

S5.C.4.c.v. (Page 22, Line 16): The inspection requirements of this provision are unattainable. Revise this provision as follows:

"Compliance with the inspection requirements in (iii) and (iv) above shall be determined by the presence of an established inspection program designed to inspect all 30% of the sites and ~~achieving inspection of at least 95% of the sites.~~"

S5.C.4.e. (Page 22, Line 27): This section, along with section S5.C.4.b.iii., essentially obligates Permittees to assume the enforcement role for Ecology's general construction stormwater permit since the Permittee's local regulations are required to be essentially the same as those in the general construction stormwater permit. This is an unfunded mandate to assume Ecology's responsibilities, and as noted previously, Permittees will be held to a significantly higher standard of inspection performance than Ecology has demonstrated. This is an unreasonable expectation.

S5.C.4.f. (Page 22, Line 32): Ecology requires that construction site inspectors obtain a specific erosion control inspection certification, and those classes are offered infrequently. If this provision remains, Ecology must ensure that enough classes are offered to train the multitude of staff that will be required to become certified within one year. I suggest that this deadline be extended at least to two years, to coincide with the deadline for adoption of local ordinances addressing construction site runoff; three years should be considered to account for the limited training opportunities.

S5.C.5.a. (Page 23, Line 4): Delete the reference to the Stormwater Manual. This section should be revised as follows:

"Adoption of maintenance standards. ~~that are as protective, or more protective of facility function, than those specified in Chapter 4 of Volume V of the 2005 Stormwater Management Manual for Western Washington.~~"

S.5.C.5.a. (Page 23, Line 18): It appears that there is no schedule for compliance for maintenance that requires capital construction greater than \$25,000. Is that Ecology's intent?

S.5.C.5.b. (Page 23, Line 19): This section conflicts with section S5.C.5.d. below, and is unreasonable, and should be removed or revised. Since catch basins and inlets are considered flow control facilities, and may be considered treatment facilities depending on their design, this would require inspection of all catch basins and inlets annually. That requirement should be revised or deleted such that section S5.C.5.d. governs the inspection cycle. Ecology should limit this annual inspection requirement to more critical stormwater treatment facilities such as wet ponds and bioswales. Those typically serve a tributary area larger than that of a catch basin, and there are fewer of them, making annual inspections a more reasonable requirement.

S.5.C.5.g. (Page 24, Line 16): It is not clear what is meant by the reference to "lands owned or maintained by the Permittee and subject to this Permit". It seems that the only case where it would not be subject to this permit would be if it does not reside within the census defined urban area. If that is the intent, the paragraph should be revised as follows:

"Establishment and implementation of policies and procedures to reduce pollutants in discharges from all lands owned or maintained by the Permittee ~~and subject to~~ within the geographic area of this Permit, including but not limited to: parks, open space, road right-of-way, maintenance yards, and at stormwater treatment and flow control facilities. These policies and procedures must address, but are not limited to:"

S.5.C.5.g.i. (Page 24, Line 20): The last part of this paragraph repeats the first part of the paragraph. This paragraph should be revised as follows:

"Application of fertilizer, pesticides, and herbicides including the development of nutrient management and integrated pest management plans, ~~application of fertilizer, pesticides and herbicides including the development of nutrient management and integrated pest management plans;~~"

S8.B.1. (Page 33, Line 19): This paragraph should be revised as follows to limit the reports required to those applicable to the Permit area:

"A description of any stormwater monitoring or studies conducted by the Permittee within the Permittee's geographic coverage area during the reporting period. If stormwater monitoring was conducted on behalf of the Permittee, or if studies or investigations conducted by other entities were reported to the Permittee, within the Permittee's geographic coverage area, a brief description of the type of information gathered or received

shall be included in the annual report(s) covering the time period(s) during which the information was received.”

S8.C. (Page 33 through 36): Although the first permit does not propose actual water quality monitoring, it requires preparation for a monitoring program that is beyond reasonable for Phase 2 communities to conduct, is a very inefficient means to collect data, and is a significant waste of our citizens’ money because of duplication of effort and dubious usefulness of the data collected.

The Permit requires Permittees to select BMPs from the Ecology manual, but then requires each Permittee to perform water quality monitoring to determine the effectiveness of the BMP. This requirement is essentially research to prove the effectiveness of BMPs that Ecology is already mandating be used to treat stormwater. This will result in tremendous duplication of effort as many Permittees monitor the same BMPs, and is an inefficient expenditure of taxpayer and ratepayer fees.

There is already an enormous amount of monitoring data available from across the country that shows what pollutants are found in stormwater; we don’t need to collect more of the same type of data. The monitoring program should require monitoring only for the parameters needed to provide for program management decisions and the selection of appropriate BMPs; and monitoring should only be required on a select few stormwater basins.

Monitoring Recommendation

The City of Longview requests that Ecology form a stormwater partnership between Phase I and Phase II jurisdictions, environmental groups, other interested stakeholders, and Ecology staff from the Water Quality (NPDES) Program, Environmental Assessment Program, and the policy level that crosses internal program divisions. This on-going partnership would be responsible for:

1. Coordinating with the State, a baseline and trend assessment monitoring strategy at a watershed level that would link and coordinate with salmon recovery and Puget Sound Initiative programs.
2. Replacing existing monitoring language in Phase I and Phase II permits with new language identifying a monitoring program that would provide:
 - a. Meaningful management information for improving BMP selection and making other stormwater management decisions;
 - b. Reliable indicators that SWMP actions are making reasonable progress toward desired outcomes; and
 - c. Coordination and analysis of information across jurisdictions and agencies through the partnership to reduce redundancy and duplication of efforts, realize efficiencies, and improve transparency.

The City of Longview requests that Ecology convene this partnership as soon as possible to develop appropriate permit language and allow timely issuance of the NPDES Municipal Stormwater permits, and we offer our assistance and participation in convening this partnership. Should Ecology choose not to implement the recommended partnership and develop a reasonable monitoring program, we reiterate the concerns voiced in the August 18, 2005 letter from AWC and WSAC regarding this issue, and propose the monitoring program submitted with that AWC/WSAC letter. A copy of the letter and proposed monitoring program language is attached.

S9.C.3. (Page 37, Line 15): This section requires reporting annexations and incorporations, and identifying implications from those actions for the SWMP. Since this is the only location in the Permit that annexations are addressed, it is not clear how Permittees are required to deal with annexed areas. Section S1.A. specifies that the Permit applies to the entire incorporated area of the city, which implies that newly annexed areas would be subject to the permit immediately. Sections S5.A.1. and S5.A.2. require that the SWMP be implemented throughout the geographic area of the Permit and that the SWMP be updated annually, which implies that annexed areas must comply with the Permit at least at the time of annual update of the SWMP, if not immediately due to the geographic area reference. Please clarify when the Permit conditions would become applicable to areas and existing drainage systems newly into the jurisdiction.

Immediate compliance in annexed areas is not feasible. We suggest that the same timeframes identified in the initial Permit be applicable for areas annexed into the jurisdiction, regardless of when during the Permit period the annexation occurs. Permittees will need time to map newly acquired systems, develop databases and methods to include those newly annexed residents and businesses in the outreach and education programs, and apply other aspects of the Permit.

APPENDIX 1

Throughout this Appendix, as well as the Permit, delete all references to the Stormwater Management Manual for Western Washington. The City appreciates the Ecology Stormwater Management Manual for Western Washington as a guide for site planning and techniques to reduce stormwater flow and quality problems. However, it is inappropriate for the Permit to effectively require Permittees to adopt and/or apply the Manual. The Manual was developed outside of the required rule making process, and Ecology continually stressed and assured agencies that the Manual was guidance only. The Manual must not be cited as the standard or a permit requirement by reference until it has gone through the rule-making process.

Common Development Plan or Sale (Pages 1 and 17): Reference is made to application of these requirements to projects less than 1 acre in size that are part of a larger common plan of the development or sale. Under state law, Permittees cannot require development controls or mitigation for a specific project when those controls or mitigations are based on speculation of future projects. Permittees can impose such requirements when there is a larger common development plan, but the mere fact of common ownership or the sale or purchase of land does not allow Permittees to impose these regulations on a currently proposed project. Delete the words “or sale” from all provisions in this Appendix.

Road Maintenance – First Paragraph (Page 1): Revise this paragraph as follows modify the exempt road maintenance activities to include additional activities appropriate for exemption from this Appendix:

“The following road maintenance practices are exempt: pothole and ~~square~~ rectangular cut patching that is less than the full width of the roadway, overlaying existing asphalt or concrete pavement with asphalt, ~~or concrete, or a bituminous surface treatment (e.g. chip seal or slurry seal)~~, without expanding the area of coverage, shoulder grading, reshaping/regrading drainage systems, crack sealing, resurfacing with in-kind material without expanding the road prism, and vegetation maintenance.”

Road Maintenance (Pages 1 and 2): The term “road prism” needs to be defined.

Road Maintenance – Third Bullet (Page 2): Except for upgrading from dirt, all other existing surfaces are already impervious by definition. Therefore, except for upgrading from dirt, these upgrades should be defined to be replaced impervious surfaces.

Flow Control to Pre-developed Condition (Pages 4 and 24): Various locations in the Permit and this Appendix reference this definition of pre-developed condition to establish the baseline for mitigating impacts or retrofitting with stormwater control features. This condition is defined as prior to the influence of Euro-American settlement, and assumes forested condition unless documentation can be provided that the site was prairie.

The Permit requirement to mitigate new development and re-development to this defined “pre-development condition” will expose Permittees and Ecology to liability for the “taking” of property if developers are required to mitigate for conditions that already exist at the time of their development or redevelopment. This issue was formally raised on behalf of Phase I and Phase II jurisdictions in the AWC/WSAC letter to the Ecology director in July 2005, and Ecology has yet to address these concerns. If the definition for pre-developed condition remains

as proposed, this requirement is in direct conflict to the State's vesting laws for existing development and raises serious legal concerns; it is most likely illegal. This condition must be removed and rewritten to recognize a property owner's rights based on existing conditions.

We propose the following alternative to Ecology's forested pre-development condition:

Pre-developed Land Cover Condition Requirement

New development and redevelopment shall restrict stormwater discharges to the pre-developed discharge flow rates for the range of flows from 50% of the 2-year peak flow, up to 100% of the 50-year peak flow. The pre-developed land cover condition to be matched for determining allowable discharge flows shall be the land cover existing at the time of development or redevelopment (i.e. the current land cover).

Baseline Standard

The pre-developed land cover condition of "existing at the time of development or redevelopment (i.e. current land cover)" is intended to be a baseline standard for the NPDES Phase I and Phase II municipal stormwater permits. Communities may choose a more restrictive standard or standards, within the limitations of state law, when basin studies, community values or goals, or other factors identify the need for a different standard in order to meet watershed or community goals.

On-site Stormwater Management BMPs

For new development and redevelopment, runoff from existing and new impervious surfaces or cleared areas shall be infiltrated or dispersed through vegetated areas to the maximum extent practicable based on the project scope, without causing flooding, erosion, or other damaging impacts.

Redevelopment Runoff Treatment Threshold

Minimum requirements for runoff treatment from new and replaced impervious surfaces shall be required when the total of new plus replaced impervious surfaces equals or exceeds 5,000 square feet, and the valuation of proposed improvements, including interior improvements, exceeds 50% of the assessed value of the existing site improvements.

Minimum Requirement #2 – Title (Page 10): The title is missing the word "Plan", and should read as follows:

"Minimum Requirement #2: Construction Stormwater Pollution Prevention Plan (SWPPP)"

Erosivity Waiver – Bullet 6 (Page 17): This bullet should end with a period, rather than the semicolon and word “and”, which implies there should be a bullet number 7.

APPENDIX 3

Longview is willing to provide cost information at the program level, but this mandate for accounting minutia is an intrusive and unnecessary economic hardship that will require significant amounts of staff time to create and track expenditure categories and accomplishes absolutely no improvement in water quality. Ecology requires far less detail from its grant recipients, who actually receive funds from Ecology and thus have a level of accountability for expenditure of those funds; and Ecology doesn't require this level of financial accounting from other its other NPDES Permittees. It is inappropriate to include this cost accounting as a permit condition subject to Permit violations and the penalties of the Clean Water Act.

It is disingenuous for Ecology to suggest that this very detailed level of “cost data are needed to make determinations of practicability, compare effectiveness of programs and gauge budget and assistance needs.” Once the Permit is issued, issues of practicability and effectiveness of programs relative to water quality improvement are essentially rendered moot because of anti-backsliding regulations. If it is Ecology's desire to compare the effectiveness of programs between Permittees, that is not Ecology's role. Also, it is not clear if Ecology wants to gauge the budget and assistance needs of Permittees or of Ecology, but we don't need to track costs to the level of minutia proposed in order to determine those needs; general program costs would serve that purpose.

Providing this level of financial information should not be a part of the permit; Ecology should explore less burdensome methods of obtaining information to make the determinations it believes it needs. The level of detail required for the program cost information is particularly onerous, requiring development of new financial tracking systems to link expenditures to specific Permit related actions, and it will have no effect on improving water quality. Longview would much rather expend our scarce resources on accomplishing tasks beneficial to improving water quality, e.g. public education and illicit discharges.

This provision is far more burdensome than what is required in the Eastern Washington permit or what was originally required of the Phase I communities – communities with greater water quality impact, much larger programs, and typically greater resources. And, Ecology will be inundated with reports from Permittees and apparently will not have the staff to review the information. Eliminate Part II of Appendix 3, or greatly reduce and simplify the financial information required. The reporting requirements should be reduced to a more manageable level, especially the requirements for cost tracking minutia.

Annual Report Form: Please verify and correct deadline and reporting dates in the form; some of them appear to conflict with the Permit conditions. For example, Permit condition S5.C.3.d.ii. requires that the hotline be listed and publicized within two years, but the annual report form identifies its deadline as 4.5 years.

GENERAL COMMENTS

1. Ecology should not delegate their obligations onto Permittees; for example, identifying facilities and businesses in the jurisdiction that potentially require an industrial stormwater permit, or enforcement of the general construction stormwater permit.
2. Permittees are required to develop a variety of programs, literature, videos, training applications, and forms to implement the Permit. We request that in a good faith effort to minimize duplication of efforts statewide, examples of prepared items are posted on the Ecology website for easy reference and adaptation to a Permittee's local circumstances. Ideally, it would be desirable that a program development coordinator be assigned during the first permit cycle to help coordinate the flow of emerging information and provide assistance to Permittees developing their SWMP and other programs.
3. The differences between the Western Washington and Eastern Washington Phase II permits are indefensible. The more lenient Eastern Washington permit creates an economic and regulatory disparity between the east and west portions of the state, and cannot be justified by the climatic differences between the regions. Even if climatic differences could support different technical approaches to addressing stormwater, allowing Eastern Washington Permittees more time to complete similar tasks as Western Washington Permittees, and not requiring the same level of reporting, is not reasonable and is indefensible.

Some examples of this inequity are:

Public Outreach – Eastern WA Permittees are allowed 3 years rather than 2 years to develop and implement their outreach program. In addition, they are only required to design their program to reach the targeted audiences; Western WA Permittees must design a program to achieve measurable improvement in understanding and measurable behavior changes.

Illicit Detection and Discharge Elimination – Eastern WA Permittees are allowed one extra year to complete their mapping, and they are not required to map conveyances tributary to large diameter outfalls. Unlike Western WA Permittees, Eastern WA Permittees are also not required to use the IDDE Manual from the Center for Watershed Protection, and they do not have a deadline to train their staff.

Good Housekeeping for Municipal Operations – Eastern WA Permittees are allowed 1½ extra years to implement their program, and for roads, highways, and parking

lots, they're required to implement it only for facilities greater than 5,000 square feet; Western WA Permittees must implement regardless of facility size.

Annual Reporting – Eastern WA Permittee annual reports are much simplified compared to the Western WA annual reports, and they are not required to track and report their program costs to any level of detail, whereas Western WA Permittees are required to track costs to an unreasonable level of detail.

**DRAFT KING COUNTY COMMENTS ON SPECIAL CONDITION S4A
MUNICIPAL STORMWATER PERMITS – PHASES I & II**

Proposed section S4.A is unacceptable because it purports to make municipal separate storm sewer systems (MS4s) subject to a state law provision regarding wastewater treatment. The proposed subsection S4.A would make MS4s subject to RCW 90.48.520, which applies to discharge permits for "wastewater." The federal water pollution control act (CWA) and the Washington state water pollution control act (WPCA) distinguish between wastewater and storm water. Although they are each a "pollutant" when discharged into a water of the U.S., they are distinctly different pollutants; and the statutes and regulations contemplate that they will be regulated differently. This regulatory distinction reflects the real-world differences between sanitary sewer systems and storm sewer systems. The proposed subsection S4.A does not.

A primary component of the original CWA was its program to build or upgrade sewage treatment plants to provide secondary treatment. That part of the CWA focused on "publicly owned treatment works," or POTWs, which were (and are) defined as systems to collect and treat wastewater.¹ POTWs were (and are) subject to NPDES permitting requirements because their outfalls constitute "point sources" under the CWA.² Much later, amendments to the CWA rendered certain MS4s subject to the NPDES requirement as well.³ The federal regulatory definition of "MS4" specifically excludes treatment works that handle wastewater.⁴ The regulations promulgated under the CWA amendments further define the term "storm water."⁵ Under federal law, then, MS4s are not treatment works; and storm water is not wastewater.

¹ See 33 U.S.C. §1292(2)(A)-(B) (defining "treatment works") see also 40 C.F.R. §122.2 ([the term] "*POTW*" is defined at § 403.3 of this chapter." (italics in the original; bracketed material added); see also 40 C.F.R. §403.3(o):

The term *Publicly Owned Treatment Works* or POTW means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works.

² See 33 U.S.C. §1362 (defining "point source").

³ See 33 U.S.C. §1342(p).

⁴ See 40 C.F.R. §122.26(b)(8) (italics in the original; underlining added):

Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains):

- (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
- (ii) Designed or used for collecting or conveying storm water;
- (iii) Which is not a combined sewer; and
- (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

⁵ 40 C.F.R. §122.26(b)(13) ("*Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage." (italics in the original).

The WPCA and its companion statutes are consistent with the federal CWA. State law recognizes that wastewater comprises water and wastes discharged from homes, businesses and industry to the sewer system, where it is processed by treatment plants such as publicly owned treatment works.⁶

It would be contrary to the structure of the CWA and the WPCA to apply wastewater standards to MS4s. The permit regimes for wastewater and storm water are not interchangeable.⁷ This regulatory distinction reflects the real-world differences between sewer systems and storm sewer systems. Treatment works that handle wastewater properly receive individual NPDES permits conditioned on individual plant performance measures. This is consistent with their basic structure, which typically consist of large but well-documented conveyance systems that terminate in very few treatment plants with effluent and outfalls that can be sampled and monitored with relatively little difficulty. In contrast, MS4s can consist of complex small-scale drainage, piping and outfall systems that drain at numerous locations, many of which are not readily accessible, and in some cases may not be particularly well-documented. The nature of MS4s and their effluent—open to the public and the environment, exposed to the vagaries of interstate and international travel—also makes it very difficult (if not impossible) to control what goes into them.

It was not by accident that Congress specified that regulated MS4s "reduce the discharge of pollutants to the maximum extent practicable."⁸ The "maximum extent practicable" (MEP) requirement in 33 U.S.C. §1342(p)(3)(B)(iii) replaces the water quality standard requirements of §1311 and unambiguously demonstrates that Congress did not require MS4s to comply strictly with §1311(b)(1)(C).⁹ The MEP requirement stands in stark contrast to the CWA's stated goal that discharges of pollutants to waters of the U.S. be "eliminated" by 1985.¹⁰

Against this statutory backdrop, it seems plain that RCW 90.48.520 does not and should not apply to MS4s. The very title of the section ("Review of operations before issuance or renewal of wastewater discharge permits") indicates that it is aimed at POTWs and other wastewater dischargers, not MS4s and other storm water dischargers. And the requirements set forth in RCW 90.48.520—limits on discharges of specific chemicals, limits on overall toxicity, reliance on bioassays, etc.—indicate that the Legislature contemplated discharges that could be readily monitored, assessed, and controlled. MS4s are not readily monitored, assessed, or controlled. POTW outfalls are.

⁶ See 90.46.010(7) (defining "wastewater" for purposes of reclaimed water act) ("Wastewater means water and wastes discharged from homes, businesses, and industry to the sewer system."); see also WAC 173-221A-030 (defining "wastewater" for purposes of waste permit regulations) ("Wastewater" means the water or liquid carried waste. These wastes may result from any process or activity, including but not limited to, of industry, manufacturer, trade, business, development of any natural resource, or from animal operations such as feed lots, poultry houses, dairies, or fish rearing operations. The term also includes contaminated storm water and leachate from solid waste facilities.); see also WAC 173-224-030 (defining stormwater for purposes of wastewater discharge permit fees) "Storm water" means an industrial operation or construction activity discharging storm water runoff as defined in 40 CFR 122.26 (b)(14) or facilities that are permitted as a significant contributor of pollutants as allowed in the federal Clean Water Act at Section 402 (p)(2)(E).

⁷ For example, compare 40 C.F.R. §122.21(a)(2)(i)(B) (POTW application requirements); 40 C.F.R. §122.26(d) (large and medium MS4 application requirements).

⁸ 33 U.S.C. §1342(p)(3)(B)(iii).

⁹ *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. Az 1999) (stating same).

¹⁰ 33 U.S.C. §1251(a)(1).

Finally, RCW 90.48.520 was enacted in April of 1987.¹¹ It replaced an earlier statute, which required Ecology to study the feasibility of reviewing and updated existing standards for wastewater treatment.¹² Ecology told the Legislature that it would be expensive to revise existing standards for wastewater treatment, and that it would be better to simply enact new standards.¹³ The Legislature responded by enacting RCW 90.48.520. The federal MS4 permit scheme was added to the federal CWA just a few weeks earlier, in February of that same year.¹⁴ Prior to the MS4 scheme, there was no CWA mandate to control municipal storm water runoff.¹⁵ Even after the MS4 requirements were added, most storm water discharges did not need an NPDES permit until after 1994.¹⁶ It is hardly conceivable that in 1987 the Washington Legislature intended RCW 90.46.520 to apply to then-unregulated storm water discharges. Rather, the Legislature authorized Ecology to enact new wastewater regulations for POTWs and other wastewater treatment providers.

The requirements in RCW 90.48.520 do not belong in a general MS4 permit. The sprawling nature of MS4s renders it virtually impossible to "limit the discharge of specific chemicals" to or from MS4s as would be required under that statute. It would require an enormous infusion of money (potentially billions of dollars) and time (potentially decades) to reinvent MS4s to treat runoff to the level of the treatment plants contemplated in RCW 90.48.520. Such an effort would be equivalent to the original CWA mandate to upgrade wastewater treatment plants to secondary treatment. Surveillance and social initiatives to keep pollutants out of the storm water could potentially cost even more.

Policy initiatives of this magnitude should be instigated through a change in the law by Congress or the state Legislature, not through an obscure condition in an administratively issued general permit. If Ecology wants to require POTW-level treatment of storm water, then Ecology should seek a change in state law, and the Legislature should be prepared to finance the work—and manage the public process to deal with the impacts of the projects. To do otherwise would result in an unfunded mandate to local jurisdictions operating MS4s.¹⁷

¹¹ See 1987 Laws of Washington Ch. 500 §1 (ESHB 499).

¹² See 1987 Final Legislative Report for ESHB 499.

¹³ Id.

¹⁴ See P.L. 100-4, Title IV §401-405 (February 4, 1987), 101 Stat. 65-69.

¹⁵ See, e.g., *Defenders of Wildlife v. Browner*, 191 F.3d 1159 at 1163 ("Initially, the EPA determined that [storm water] discharges generally were exempt from the requirements of the CWA.").

¹⁶ Id (citing 33 U.S.C. §1342(p)).

¹⁷ See, e.g., *City of Tacoma v. State*, 117 Wn.2d 348, 816 P.2d 7 (1991); RCW §43.135.060.



Mr. Jay Manning, Director
Washington State Department of Ecology (DOE)
P.O. Box 47600
Olympia, WA 98504-7600

{{Sent August 18, 2005}}

RE: NPDES Phase II Stormwater Permit – monitoring proposal

Dear Mr. Manning;

As indicated in our letter to you on July 19, 2005, interested Phase II jurisdictions have come together to develop monitoring counter proposal to the language currently in the preliminary draft Phase II NPDES permit.

We would like to reinforce our position that Phase II jurisdictions respect the need to improve stormwater runoff water quality to protect aquatic resources and that Phase II cities and counties support the Phase II permit program and the six mandatory minimum guidelines as established by the Environmental Protection Agency (EPA) with the additional two program guidelines established by DOE.

Further, Phase II communities understand DOE's desire to have quality information to determine whether the programs are being fully implemented and are effective in protecting our states water resources. We support DOE's interest in identifying opportunities for improving stormwater management programs.

Many Phase II jurisdictions have stated concerns about the monitoring program as outlined in section S6 of the draft permit. It is their belief based on many years of experience as well as the Phase I efforts that the current Phase II permit monitoring proposal:

- will not provide an accurate reflection of the influences of stormwater management plans on water quality due to other pollutant sources that are not within the control of the stormwater management program.
- will not provide meaningful data for adaptively managing stormwater programs for continual improvement.
- will be inordinately expensive with little return.
- will duplicate other monitoring efforts at the regional and state levels.
- will not be implemented in a manner that will provide coordinated local, regional, and state level information.

The current monitoring program focuses on water quality and beneficial uses. In July, 2001, the State Legislature enacted Substitute Senate Bill 5637 relating to watershed health monitoring

and assessment. The legislature recognized that many programs were attempting to monitor various aspects of watershed health. The bill was supposed to refocus existing agency monitoring activities to “implement a comprehensive watershed health monitoring program,” albeit with a focus on salmon recovery.

The framework for this watershed based, state level monitoring program was recently funded by the Salmon Recovery Funding Board and assigned to DOE and Washington Department of Fisheries to implement the structure. Although focused on salmon recovery, the program objectives are to “be based on a framework of greater coordination of existing monitoring activities; require monitoring most relevant to adopted local, state, and federal watershed health objectives; and facilitate the exchange of monitoring information with agencies and organizations carrying out watershed health, salmon recovery, and water resources management planning and programs.” Phase II jurisdictions feel that the current permit monitoring proposal would be duplicative of this effort.

The Phase II jurisdictions we have been working with have developed a proposal that they believe would provide data on implementation effectiveness and information resulting in improvements to local stormwater management programs. The proposed program could be implemented by all Phase II jurisdictions, regardless of their resource levels or experience with stormwater management programs.

We believe the attached monitoring proposal is better aligned with the nature of the NPDES stormwater permit which is BMP focused, rather than establishing specific water quality outcomes for each jurisdiction’s permit. Stormwater runoff water quality is highly variable and urban streams collect non-point pollution from a variety of sources, not just public stormwater systems. This makes quantifying cause and effect relationships difficult at best, impossible typically.

Rather than conducting yet more water quality studies, it would seem prudent to spend limited resources on the right kind of monitoring that actually reduces pollutants entering our streams, lakes, and marine resources. The attached proposal attempts to do just that.

Once again, we would like to express our appreciation for Ecology’s work to date on this important issue.

Sincerely,



Dave Williams
Staff Associate
Association of Washington Cities

Paul Parker
Assistant Executive Director
Washington State Association of Counties

cc: Bill Moore, Department of Ecology

AWC Monitoring Proposal Attached to August 18, 2005 Letter
(Section references are based on pre-draft permit)

Permit Condition S6 Small MS4s Environmental Results Monitoring

Below are examples of potential evaluation measures for the five Stormwater Management Program Components and TMDLs. Evaluation measures already identified by Ecology in the preliminary draft permit are also noted.

EXAMPLES OF POTENTIAL EVALUATION MEASURES
<p>Program Component S7.C1 Public Education & Outreach</p> <ul style="list-style-type: none">■ Monitor good housekeeping practices of businesses to document/demonstrate a reduction in the percentage of businesses that discharge pollutants into the municipal separate storm sewer system as a result of public education & outreach; for example, reduction in percentage of restaurants that dump grease and other pollutants down storm sewer drains.■ Monitor and report the number of people (new and regular people) participating and/or reached by each outreach program annually. For example, participants involved in Stream Team program, people requesting information on oil recycling and/or participating in a pollutant source control survey or workshop, etc.■ Monitor number of charity car wash events utilizing jurisdictions car wash kits/programs, and private car wash associations, e.g., Puget Sound Car Wash Association. Track the number of “safe” car wash events, # vehicles participating; estimate or evaluate the amount of pollutants diverted from the storm sewer system.■ Monitor any programs conducted for curb marking (for example, stenciling pavement in front of catch basins with “Drains to Stream, Do Not Dump”). Include number of participants, structures marked, acreages involved.■ Monitor number of businesses referred to other pollution prevention programs at the local, state, or national level.
<p>Program Component S7.C2 Public Involvement & Participation</p> <ul style="list-style-type: none">■ Monitor opportunities for stakeholders and citizen participation in developing Stormwater Management Program and TMDL programs.■ Monitor percentage of the community participating in community clean-up and/or other water quality outreach activities, i.e., stream team, business partners for clean water, etc.
<p>Program Component S7.C3 Illicit Discharge Detection & Elimination</p> <ul style="list-style-type: none">■ <u>Ecology-specified evaluation measure in preliminary draft permit</u>: “Monitor, characterize, quantify where possible, and document the reduction in illicit connections to and illicit discharges from the MS4, including this permit required measure:<p>S7.C3. ii. Each Permittee shall prioritize receiving waters for screening for illicit connections and other illicit discharges and shall conduct field screening of all outfalls into three high priority water bodies no later than the three years from the effective date of this permit, and</p>

shall conduct field screening on at least one water body per year there after. Screening for illicit connections shall be conducted using: Illicit Discharge Detection and Elimination: A Guidance Manual for Program Development and Technical Assessments, Center for Watershed Protection, October 2004, or an equivalent methodology.”

Program Component S7.C3 Illicit Discharge Detection & Elimination Continued

- Monitor, characterize and document the reduction in pollutants discharged to the municipal separate storm sewer system from illicit discharges detected and eliminated;
- Monitor and document households participating in quarterly household hazardous waste special collection days; estimate quantities of hazardous wastes diverted from the MS4 system from the special collection days.

Program Component S7.C4 Controlling Stormwater Runoff from New Development, Redevelopment, & Construction Sites

- Construction flow control – Monitor # of enforcement actions and/or compliance with turbidity standards through turbidity monitoring.

Program Component S7.C5 Pollution Prevention and Operations & Maintenance for Municipal Operations

- Monitor sediment accumulation rates for public flow control, water quality treatment facilities and catch basins to adaptively manage the Program to achieve the most effective pollutant removal maintenance schedule (i.e., cleaning frequency).
- Estimate the volume of sediment and other pollutants removed from the MS4 through implementation of the Pollution Prevention and Operations and Maintenance for Municipal Operations Program BMPs (i.e., sediments, chlorinated water, hydrocarbons, metals, etc.).
- Monitor and report tonnage removed from public streets due to street sweeping activities. Use collected data to optimize removal of dust, dirt, and other particulates.
- Monitor the tonnage, volumes of sediments and decant from private storm system inspection programs..

Permit Condition S4 Total Maximum Daily Loads

- Ecology conducts a Use Attainability Analysis (UAA) prior to initiating TMDL-required water quality clean-up plan to verify that the TMDL is based on science and is in accordance with community values.
- The following evaluation measures for applicable TMDLs were identified in the preliminary draft permit by Ecology:

“S4. B. ...Permittees shall track actions required by this Permit that are relevant to applicable TMDLs within their jurisdiction.”

“S4. C 1. If water quality monitoring is a specific requirement of a TMDL listed in Appendix 3, the Permittee must develop and implement a TMDL monitoring Quality Assurance Project Plan (QAPP). The Permittee shall submit the TMDL QAPP no later than 90 days after the effective date of this permit, unless otherwise specified in Appendix 3. The monitoring plan shall be submitted to the Department in both paper and electronic form and shall include:

- a. A detailed discussion and description of the goal and objective(s), monitoring (experimental)

design, and sampling and analytical methods.

b. A list and maps of the selected TMDL monitoring sites.

c. The frequency of data collection to occur at each station or site and the number and types of precipitation events to be targeted for sampling.

Permit Condition S4 Total Maximum Daily Loads Continued

d. The method and location(s) of precipitation measuring devices.

e. The triggers for automated flow monitoring devices.

f. The parameters to be measured, as appropriate for and relevant to the TMDL.

g. The QAPP will be implemented beginning no later than 180 days after the effective date of this permit.”

“2. For TMDLs listed in Appendix 3, affected Permittees shall include, as part of the Permittee’s annual report to the Department, a TMDL Summary Implementation Report. The report shall include the status and actions taken by the Permittee to implement the TMDL. The TMDL Summary Report shall document relevant actions taken by the Permittee that affect MS4 discharges to the waterbody segment that is the subject of the TMDL. The report must also identify the status of any applicable TMDL implementation schedule milestones.”